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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

NO. 79-1855

EASTALCO ALUMINUM COMPANY,
Petitioner,

v.

PUBLIC SERVICE COMMISSION OF MARYLAND
and
THE POTOMAC EDISON COMPANY,
Respondents.

BRIEF OF THE POTOMAC EDISON COMPANY
IN OPPOSITION TO PETITION
FOR A WRIT OF CERTIORARI

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The Potomac Edison Company (Potomac), one of the respondents, respectfully urges that the petition for a writ of certiorari filed by Eastalco Aluminum Company (Eastalco) be denied, since it presents no special or important reason for review.

The decision of the Court of Special Appeals of Maryland (A.13a) rendered *per curiam* on December 12, 1979, and not reported in the official reports of that court, involves no federal constitutional question nor any compelling interest or novel issue. The intermediate appellate court of Maryland merely construed the provisions of the Maryland Public Service Commission Law (Annotated Code of Maryland, 1975 Replacement Volume, Article 78) as it affects "special contracts" between utilities and their larger or unique customers.

The Maryland Court of Special Appeals held – as had the Public Service Commission itself (A.25a, 93a) and the Circuit Court of Baltimore City (A.18a), before it – that no constitutional or federal statutory standard prevents the Commission from treating a service contract like any other tariff filed by a utility.

The contract between Potomac and Eastalco expressly states, in paragraph 4(K), that "the charges recited herein are subject to regulation by the Regulatory authorities having jurisdiction" (A.19a). In three layers of prior unsuccessful appeals, Eastalco has never contended or even suggested that the Public Service Commission of Maryland is not a "regulatory authority having jurisdiction" – nor is such an argument made here.

The point of controversy in the Eastalco contract with Potomac is a single clause which causes automatic increases (or decreases) in the price of electric power when the utility's own cost of fuel changes significantly. The Commission found both in its Case No 6759 (A.93a, 95a), concerned with so-called fuel rate adjustment clauses (FRAs) employed by all Maryland electric utilities, and in Potomac's 1977 rate decision, Case No. 7038 (A.26a, 76a), that Eastalco's contract term should be

modified slightly in its fuel rate adjustment. The effect of the ruling was to conform Eastalco's FRA to the Federal Power Commission model applied to all other Maryland electric customers – calculating the cost of fuel from average system costs, rather than from more favorable cost experience at a single, newer power plant.

The Maryland courts found no reason in the Maryland statute or scheme of rate regulation why that might not be done; and as will be seen, there is no federal ground, in the Contract Clause of the United States Constitution or otherwise, to challenge the Commission's action. The petition should therefore be denied.

STATEMENT OF FACTS

Potomac essentially accepts the recitation of facts contained in Eastalco's petition. Potomac emphasizes, however, that in *neither* of the Commission's proceedings there referred to (Case Nos. 6759 and 7038) from which Eastalco has appealed, did Potomac seek or request modification of any provision of its service contract with Eastalco. The FRA modification was initiated by the Commission itself, after reviewing and accepting the testimony of a witness, Alvin J. Garber, sponsored by the Office of People's Counsel (A.42a-43a).

QUESTION PRESENTED

Whether the Maryland Public Service Commission acted within its constitutional powers in modifying a term of Eastalco's electric service contract with Potomac.

REASONS FOR DENYING THE WRIT

In pressing its case to this Court, Eastalco asserts solely a constitutional claim under the Contract Clause (Article I, Section 10) of the Constitution of the United States. The petition seemingly abandons a variety of issues of statutory construction and sufficiency of the evidence, asserted in vain before the courts of the State of Maryland.

To place this matter in its proper context, the following points must be understood: (a) Eastalco takes and pays for energy under an agreement entered into with Potomac, executed in 1967 for an initial term of twenty years beginning March, 1970 (the agreement); (b) the agreement was filed with and accepted by the Maryland Public Service Commission before service to Eastalco began; (c) the agreement was and is a "tariff" over which the Maryland Commission had and has jurisdiction, as it has over every other tariff under which Potomac supplies energy to its customers; (d) the legal status of the agreement (characterized in clause "c" above) is recognized in the agreement itself; and (e) the Maryland Commission, in the actions involved in this proceeding, simply modified the Eastalco-Potomac tariff, as it had the power to do with respect to it or any other tariff over which the jurisdiction of the Commission extended.

Petitioner, seeking a review of this mundane exercise in a state's effort to achieve a degree of rate equality among consumers of electric power, attempts to catapult the issue into federal constitutional proportions. To achieve this end result, petitioner relies on two decisions of this Court, which do *not* however involve constitutional issues. This fact was conceded by Eastalco itself, in its prior petition for writ of

certiorari filed in the Court of Appeals of Maryland (A.2a *et seq.*) where petitioner acknowledged (A.8a):

> "Of course, in the *Sierra-Mobile* case, the Contract Clause was not in issue since both involved appeals from federal administrative agencies."

The so-called *Sierra-Mobile* doctrine arose from this Court's companion opinions in *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956), and *Federal Power Commission v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956). Since petitioner concedes that those decisions are grounded in federal statutory interpretation, rather than in federal constitutional requirements under the Contract Clause, they have no necessary relevancy to a case of state utility regulation. Petitioner also concedes that the Maryland courts in this case, as generally, have refused to adopt or apply the *Sierra-Mobile* doctrine or standards to consideration of "contract rates" subject to jurisdiction of the Maryland Commission.

Nevertheless, petitioner somehow exalts the issue or the imperative of those standards to constitutional stature. What this Court said, in brief, in the *Mobile* and *Sierra* decisions, is that under the procedures for rate changes specified in the Natural Gas Act and the Federal Power Act, a public utility may not act unilaterally to change or increase rates charged to a customer under contract, by a simple filing with the agency having jurisdiction. Rather, the utility which seeks to increase its rates bears the burden of showing that the existing rate is either unduly discriminatory, or imposes an excessive burden on other customers, or impairs the financial integrity of the utility company.

It would appear to be petitioner's argument that the Contract Clause of the Constitution of the United States incorporates or imposes or engrafts the standards enunciated in *Mobile* and *Sierra* onto utility regulation in the several states, insofar as a "contract rate" is concerned. However, there is not a shred of authority for that position, either in the decisions of this Court or in the applicable Maryland statute.

Petitioner asserts that the provisions of the Maryland Public Service Commission Law are "substantially similar" to those of the Federal Power Act and Natural Gas Act, construed by this Court in *Mobile* and *Sierra*. In actuality, there are more dissimilarities than similarities, but comparisons are irrelevant. For assuming *arguendo* that the language of the Maryland statute was *identical* to the terms of the federal act, the Maryland Commission and courts are nevertheless at complete liberty to construe the local enactment, and to apply any appropriate standards of rate-making. Differences of philosophy or approach between state and federal regulation of utility rates do not create a constitutional issue under the Contract Clause.

The instant matter must be judged, on its own record and its own merits, as an application of the Maryland Public Service Commission Law. That Law *nowhere mentions* special contracts or contract rates, as entitled to any more recognition than other tariffs imposed by order of the Commission. As previously stated, the Eastalco contract is simply a tariff like any other tariff filed under Md. Ann. Code, Article 78, Section 28(a) (1975); and the standards to be applied are not the *Sierra-Mobile* standards recited, but the standards of "just and reasonable rates" applicable generally under Md. Ann. Code, Article 78, Section 69(a) (1975).

This is perfectly consistent with the terms of the Eastalco contract itself which by its terms is binding between the parties thereto, but is "subject to regulation by the Regulatory authorities having jurisdiction" (paragraph 4(K)). The Maryland courts have held that the police power is inherently superior to any private right to fix utility rates by a contract, which therefore cannot be entered into without knowledge of that supervening right to alter its terms.

The Maryland Court of Appeals in *Yeatman v. Public Service Commission*, 126 Md. 513 (1915), expressly relied on this Court's earlier decision in *Manigault v. Springs*, 199 U.S. 473 (1905), in establishing these principles for purposes of Maryland law. The Maryland Court first discussed the Public Service Commission's powers over all rates, and said (126 Md. at 517-518):

> "The right to regulate rates for which water will be supplied is in its nature the execution of one of the powers of the State, of which it can no more divest itself than it can part with its power of taxation. . . . The nature of the right as an exercise of the power of the State is commonly referred to that class of powers designated as the police power, and the right extends not merely to the regulation of rates, but to the regulation of other matters connected with the service afforded to the public. This power is one which may be exercised by the Legislature directly, or its exercise may be committed by the Legislature to a Board or Commission, as has been done in this State by the creation of the Public Service Commission, and since the supplying of water must by reason of the nature of the service be deemed to be a public service, the

> regulation of the rates at which it shall be furnished falls clearly within the powers of the Commission."

The court held that it makes no difference whether the rates are established by simple tariff, or by the bilateral tariff that is a utility service contract – in either event, the rate must yield to the legislative powers of the Commission. The Court said (at 518):

> "Contracts, even as between individuals, when entered into are necessarily subject to the control of the police power of the State, whenever such contract relates to matters which are or may be subject to the exercise of such powers. . . ."

Quoting from *Manigault v. Springs, supra* at 480, the *Yeatman* court spoke directly to the argument under the Contract Clause (at 159):

> " 'It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the state from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected. This power, which, in its various ramifications, is known as the police power, is an exercise of the sovereign right of the government to protect the lives, health, morals, comfort, and general welfare of the people, and is paramount to any rights under contracts between individuals.' "

In summary, this case involves action by a state regulatory authority which modified a utility tariff that it had previously accepted. That this tariff took the form of an agreement between the customer and the utility did not transform the agreement into a "contract" within the meaning of Article I, Section 10 of the Constitution of the United States. No decision of this Court supports such a theory. To accept the petitioner's argument would require this Court to review, in appropriate cases, the acts of all state utility commisions which seek to change filed tariffs established by contract when those state regulators believe that, in the public interest, changes should be made. If this result should follow, the acknowledged police powers of the states over their own constituency would be abrogated. Neither judicial authority nor common sense impels this conclusion.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari to the Court of Special Appeals of Maryland, with respect to its decision affirming the orders of the Circuit Court of Baltimore City and the Public Service Commission of Maryland, should be denied.

Respectfully submitted,

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